Judges on Briefing: A National Survey

Collected and Introduced by Bryan A. Garner

Introduction

In the summer of 2000, I rewrote a major appellate brief that several big firms in the Northeast and Midwest had worked on. The many lawyers in the case couldn't agree on how to present their arguments, so my colleagues and I at LawProse were asked to be editorial consultants. As usual in this situation, I had several colleagues work with me on the brief: four lawyers and an English professor. All six of us independently edited the brief. I asked one to concentrate on the introduction and another to concentrate on the conclusion. I rewrote the issues. Meanwhile, we all edited the whole brief.

When all the edits were in (within a five-day deadline), I consolidated them into a new draft. The resulting brief looked quite different from the original. It was shorter. We had axed two arguments. We had tightened the arguments considerably and improved the narrative line. The issues, the opener, and the closer were entirely new. We had cut all substantive footnotes, working a few points into the text and deleting others.

The brief ended up being filed pretty much as we had rewritten it, with refinements here and there. One of the lawyers involved — a longtime friend of mine — told me that the before-and-after versions reflected the differences in how he and I approach brief-writing. He said that he had always seen a brief as being "a repository of all the information that a curious judge might want to know about the case," and he characterized my view as being that a brief should be a tight essay.

To my mind, he neatly summed up a major fault line that divides some brief-writers from others. I had noticed it many times before but had never seen it quite so clearly. So I quickly wrote down his view of what a brief should be, amplifying it slightly. And I recorded my own view. Mine is #1; his is #2.

> #1 A brief should be an essay with a clear train of thought, advancing two or three cohesive, well-supported arguments that, taken together, make up a unified whole — while rebutting the opposition's counterarguments. The brief-writer should marshal the relevant precedents but omit everything that does not advance the argument or, in the brief-writer's considered judgment, does not somehow bear on the decision-making process. A brief-writer who can deal adequately with the subject matter in five or ten or fifteen pages should be encouraged to do so.
>
> #2 A brief should be a repository of all the information that a curious judge might want to know about the case, packed into the space available. Because judges think differently — and it's difficult to predict what a judge might think is important — it's a good idea to cover as much terrain as possible and not restrict the arguments beyond court-imposed page limits or word limits. It's risky not to use all the allotted space with arguments that, though possibly weak, might appeal to some judges. Likewise, it's a good idea to cite as much law as possible.

After recording these views, I decided to make a nationwide survey of judges' opinions. So I wrote letters to more than 100 judges, asking them their preference and inviting them to explain their views briefly. The responses were as follows:

View #1 Is Preferable	View #2 Is Preferable	Neither Is Quite Right
49 (86%)	0 (0%)	8 (14%)

The responses fascinated me. And I imagine they'll fascinate lawyers everywhere.

More than that, though, these responses should be genuinely useful to lawyers: here you have the collected thoughts of current judges — state and federal, trial and appellate — throughout the United States. Even if you're before a judge whose views aren't recorded here, you'll undoubtedly benefit from seeing this representative sampling.

My heartfelt thanks to all the judges who took the time to participate in this survey.

#1 Is the Better View

HON. GREG ABBOTT
SUPREME COURT OF TEXAS

I prefer #1. It typically is more clear and concise and is easier to understand. I also think it is more relevant to the Supreme Court process — the big jurisprudential picture — than to the more detail-oriented approach that may be required of intermediate appellate courts.

HON. SUSAN AGID
WASHINGTON COURT OF APPEALS (SEATTLE)

I am definitely in the #1 camp. I usually find that when people write everything they can think of, the brief lacks organization, coherence, and often any discernible point. It seems as if a lot of attorneys think they must keep writing until they reach the page limit, whether or not the information is useful. A brief that explains the facts clearly and honestly, summarizes what the author intends to argue, and presents the arguments clearly and concisely is much more likely to persuade me than a "repository of all the information . . . a curious judge might want to know about the case." A long, rambling treatise giving us the "benefit" of every thought the attorney ever had about the case will usually not persuade because it leaves the reader feeling that the author was not particularly persuaded that his or her arguments were strong.

There are, of course, cases in which more length and in-depth explanation are beneficial. For example, if the case presents esoteric issues that the court is likely to know little about, a brief that starts with "in the beginning there was the Sherman Antitrust Act" and educates the court about the history and policies of the law will be very helpful. I always tell people to do that in land-use and environmental cases because no one understands the whys and wherefores of it. So there you have it.

HON. DEBORAH AGOSTI
SUPREME COURT OF NEVADA

I tend to agree more with view #1. I certainly agree that an attorney should never write just to fill the page limit. And of course a brief shouldn't contain extraneous material. But occasionally you do see the truly inspired brief that does everything the first view describes but also anticipates what is going to be problematical for the court and addresses those points as well.

HON. PAUL H. ANDERSON
SUPREME COURT OF MINNESOTA

I believe #1 is the better paragraph. I am convinced that my colleagues would wholeheartedly agree that #1 is the preferred approach. My only qualification is that in the rare case where there are diverse and difficult issues, the approach in #2 might work better.

That said, the statement that it is risky not to use all the allotted space with arguments generally is not true. Most appellate judges will say that they get tired of hearing the same argument repeated in numerous different ways. Lawyers need to trust the judge to get it the first time or at least the second time, but there is no need to tell it to the judge a half-dozen ways because he or she will start tuning out quickly when this happens.

HON. JAMES A. BAKER
SUPREME COURT OF TEXAS

For the reasons stated in view #1, I can record my views in considerably less than 250 words. This is because #1 expresses all the reasons that a brief should be brief.

HON. WILLIAM O. BERTELSMAN
U.S. DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

Obviously #1! View #2 is a recipe for disaster.

HON. KATHLEEN A. BLATZ
CHIEF JUSTICE, MINNESOTA SUPREME COURT

My vote is for view #1 — clear, cohesive, and concise writing. By focusing on their strongest arguments, brief-writers will address and develop the spectrum of issues critical to the decision-maker. Quick references to a myriad of other issues dilute the strength of a party's best arguments and do little to persuade the reader of the correctness of a certain result.

HON. DANNY J. BOGGS
U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

I think that it is pretty clear (and probably was designed to be) that #1 is the better view. But I think that there are some points in #2 that, when suitably qualified, should be taken into account. I believe that it is true that "judges think differently — and it's difficult to predict" their predilections. Thus, I think that a brief-writer, after suitable thought, might well write somewhat more broadly than if the writer were simply doing an academic paper for maximum logical impact, or an internal memorandum to convey succinctly the writer's views.

Put another way, the brief-writer should assess the possible gain from moving in the direction of #2 in persuading an "outlier" judge against the loss in clarity and persuasiveness that is the hallmark of #1. In general, I think the ideal brief (prepared with no knowledge of the specific judge or judges it will reach) is pretty close to #1, but with a certain amount of the caveat I have expressed.

Of course, in the instance where one is addressing judges of known varying views, there may be a reason to swing more toward #2.

HON. W. EUGENE DAVIS
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

I firmly believe that #1 is the better view. I see very few cases with more than two or three issues that are truly dispositive of the appeal. Most of the briefs I see that raise eight or ten issues include issues that make no difference in the outcome of the appeal. This sends a signal that the losing party or losing lawyer has a badly bruised ego but not much of an appeal. When some of counsel's multiple points of error are obviously weak or insubstantial, counsel loses credibility. With this loss in credibility, the judge becomes less receptive to the notion that the trial judge erred in any respect.

HON. JOHN M. DUHÉ JR.
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

The first view is the better view. I think it is the only view. The reasons abound.

I am a busy judge. I don't have time to read a law-review article masquerading as a brief. Tell me only what I need to know to reach the result you want — and do it in a soundly reasoned manner. Nor does it convince me for the writer to string out every cite he can find to support a point. A single, well-reasoned precedent is enough.

The purpose of the brief is to persuade me that the outcome the writer wants the court to reach is the correct outcome, and that the path to that outcome is the correct one. Careful, cogent thought, clearly and cogently expressed, is what convinces me. The brief-writer is most helpful to me when she tells me not only what decision to reach but how to get there.

Never loosely speculate about what the judge might think is important. Brief-writers should make it so clear that the judge will instantly know what is important and why. Discuss that and little else.

HON. CRAIG T. ENOCH
SUPREME COURT OF TEXAS

As you know, view #1 represents the appropriate approach to brief-writing. Ironically, because that answer was so clear to me, it proved an impediment to my actually explaining why that answer was right.

Cogent briefs produce cogent opinions. In other words, it is less likely that a judge will produce a poorly written opinion while relying on a well-written brief than it is that the judge will produce a well-written opinion from a poorly written brief. Also, when I look at view #2, "rabbit trails" come to mind. While some judges (I suggest very few) may be able to explore rabbit trails, enjoy the trek, and not lose sight of the destination, I can't. At least I can't keep my bearings without great difficulty. So why adopt a briefing approach that puts me to the test?

Some judges may answer that view #2 might be an appropriate approach. I'd be curious about whether they're former law professors.

HON. DUROSS FITZPATRICK
U.S. DISTRICT COURT, MIDDLE DISTRICT OF GEORGIA

I think that view #1 reflects the better approach to briefing. View #2 is problematic because it assumes that more information is necessarily better. I feel that concision and accuracy are more persuasive and allow the court and the parties to use their time more efficiently. A better description of a brief might read as follows:

A brief should be an essay with a clear train of thought, advancing only as many cohesive, well-supported arguments as necessary that, taken together, make up a unified whole — while rebutting the opposition's counterarguments. The brief should marshal the relevant precedent but need not address irrelevant arguments. Also, it must include contrary authority that is on point and controlling.

The brief-writer should recognize that length does not correspond to persuasiveness; therefore, the brief should be as concise as possible. The brief-writer should never exceed the page limits imposed by the court rules unless the court grants permission. Likewise, the brief-writer should not feel compelled to use all the pages allowed by the court.

Credibility is an extremely important component of a good brief. Misleading or incorrect citations, however unintentional, detract from the persuasiveness of the brief. The brief-writer should carefully draft and edit for correct citations, as well as for punctuation, grammar, and syntax. Too many briefs arrive without the rewriting necessary to make them truly persuasive. Mark Twain once said: "Easy writing makes damned hard reading." How true this is in legal writing.

HON. ARTHUR GILBERT
PRESIDING JUDGE, CALIFORNIA COURT OF APPEAL (VENTURA)

Curiosity has killed more judges than it has cats. A judge whose insatiable curiosity would drive him or her to view #2 as the preferable view will soon die of fatigue, if not boredom. I predict that no seasoned judge, unless masochistic, will pick #2.

My advice to brief-writers is to be brief. Say what you have to say in reasonably short declarative sentences powered by nouns and verbs. If a sentence has more than 20 words, it usually needs to be redrafted. Adjectives often lead one to characterize, or more often, to mischaracterize. A well-reasoned argument without fancy descriptive phrases is more likely to compel the judge to draw the right conclusion. If you are the appellant, deal only with the error that matters, the one that has a chance to produce a reversal. If you find several such errors, you are either extremely lucky or in error yourself. If one citation will do, a string of them will detract more than it will help. Do not assume the judge knows anything about your case. Ask yourself what this case is about. Then explain it to the

judge, who has dozens of briefs besides yours to read. If you make a judge's life easier, he or she will be grateful.

HON. RUTH BADER GINSBURG
SUPREME COURT OF THE UNITED STATES

Of the two views you present, I would choose #1. A brief will be most helpful to the judge, and net the brief-writer the greatest gain, if the judge can use the brief to compose an opinion in the brief-writer's favor. A kitchen-sink presentation may confound and annoy the reader more than it enlightens her. In busy courts, judges work under the pressure of a relentless clock. If a brief runs on too long, the judge may not read beyond the summary of the argument. The same fate may attend a brief that makes arguments a judge cannot reasonably be expected to buy. Of prime importance, a brief should be trustworthy. If authorities are inaccurately described, the judge will lose confidence in the reliability of the brief and its author; if the judge reads on at all, she will do so with a skeptical eye.

HON. JOHN C. GODBOLD
U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

View #1.

HON. C. KENNETH GROSSE
WASHINGTON COURT OF APPEALS (SEATTLE)

A "winning brief" has to grab my attention at the earliest possible point, focusing me on the central nature of the case and the principal issues. One cannot get to this point without focus, without clarity, or without forthrightness with respect to weaknesses and counter-arguments. What is this dispute about? Why are you before the

court? What do you want the court to do? And why is that the best answer in this case? That is the mission in submitting a brief. Any deviation from that mission detracts. Extensive deviation through emphasis on secondary arguments, collateral matters, or unnecessary recitation of facts or settled law not only detracts, but annoys and repulses.

A brief that extensively deviates from the principal mission also demonstrates weakness — the author's lack of confidence in the case. A "winning brief" leaves me with the belief that the author has not only a complete understanding of the facts and the applicable law, but also a complete understanding of the case's context. A brief that demonstrates confidence on the part of the author creates confidence on my part both in the presentation and in the presenter. A brief that adds confidence to concise precision and clarity of thought and purpose is a brief that will leave me with the belief that I could safely decide the matter having read only it, and thus eager for its refutation in the form of opposing counsel's "winning brief."

HON. PATRICK HIGGINBOTHAM
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

View #1.

HON. LYNN N. HUGHES
U.S. DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

View #1. Memoranda of law are called *briefs* rather than *encyclopedias* for a reason. A brief presents the elements of an argument concisely with references to the sources of law and with descriptions of the particular facts that define the transaction. Legal reasoning consists in saying that the facts of this case are closer to the facts in cases applying Rule A than they are to the facts in cases applying Rule B. This makes the facts — the facts of the client's transaction

and of the precedents — critical. Globs of citations do not help the court understand the transaction.

A brief has done all a brief can do once it has (a) described the transaction in concrete specifics, (b) referred to an old Supreme Court case for the principle plus two recent inferior-court cases with facts as close to yours as you can find, and (c) identified the differences between the actual facts and the facts of your opponent's references.

Data dumps do not persuade or illuminate. Long citation-filled briefs are a triumph of technique over purpose. Briefs are a medium for articulation and presentation — goals assisted by clarity, precision, and *brevity*.

HON. E. GRADY JOLLY
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

View #1. Are you kidding?

HON. JUDITH S. KAYE
CHIEF JUDGE OF THE STATE OF NEW YORK

It's not even close — #1 by a mile! A "clear train of thought," "cohesive, well-supported arguments," "rebutting the opposition's counterarguments," "deal[ing] adequately with the subject matter in five or ten or fifteen pages": that's a dream brief. It will rivet my attention, tend me to the writer's position, and linger in my mind. I'll turn to it when preparing the opinion. I can think of a few reasons to submit a kitchen-sink brief, but they are all negative. That sort of crammed-to-the-rim brief tells me that the writer doesn't have any cohesive, well-supported arguments, or can't rebut the opposition's points, or hasn't thought through the case.

A brief is, in essence, a lawyer's private oral-argument time with the judge. I'd much rather spend that time with an effective advocate than with a kitchen sink.

HON. MIKE KEASLER
TEXAS COURT OF CRIMINAL APPEALS

Description #1 is the better view of what a brief should be. Regrettably, #2 fits most briefs I have read during my two years on the court. To paraphrase Mark Twain, most are chloroform in print.

I know that especially in capital cases, most lawyers include every conceivable argument — even silly ones — because they fear being labeled ineffective or incompetent. And criminals do routinely attribute their convictions and sentences to their lawyers' mistakes. I have never heard a convicted felon say, "The reason that I am in all this trouble is that I am a no-good scoundrel." It is always someone else's fault, and that someone is usually the trial or appellate attorney.

Nevertheless, those rare briefs that conform to view #1 are the most often successful. It is refreshing to read an opening paragraph that succinctly frames the case's principal issue and urges its just and correct resolution. My attitude immediately becomes receptive.

It need not and should not be a dreary task to write or read legal briefs. The issues we confront are interesting and vitally important. With a little imagination and some hard intellectual work, we can make our writing clear, persuasive, and effective.

HON. SHARON KELLER
PRESIDING JUDGE, TEXAS COURT OF CRIMINAL APPEALS

This is easy. A brief that follows view #1 does the work for the judge. A brief that follows view #2 makes the judge have to work too hard. Irrelevant matters ought to be left out because they clutter up the logical path the writer wants the judge to follow. And straightforward arguments seem more compelling.

I appreciate writers who get to the point. In fact, I am likely to spend about the same amount of time on each pleading of a specific type — particularly petitions for discretionary review — regardless of length. It's counterproductive to waste time making arguments (and making the judge read arguments) that do nothing to further the writer's position.

Finally, a litigant can lose credibility when the lawyer advances weak arguments.

HON. JOYCE L. KENNARD
SUPREME COURT OF CALIFORNIA

The first view is the better one. To be effective, a brief must present arguments in the most persuasive fashion, and arguments are most persuasive when presented clearly and concisely. Information that is not essential to the argument may distract or confuse the judge who reads it, leaving the judge unsure of what the argument is trying to say. The line of argument in an appellate brief should be a straight road, firmly supported with legal authority, but without detours and side excursions that obscure the end from view. Judges today are too busy to indulge idle curiosity; their patience is sorely tried and quickly exhausted by a brief that is or purports to be a repository of all information having any relation, however remote or tangential, to the matter at hand. Good briefs, like good appellate opinions, should be logical and succinct.

HON. MACK KIDD
TEXAS COURT OF APPEALS (AUSTIN)

If I had to choose between view #1 and #2, I would definitely choose #1. That said, things are never so easy on the appellate bench. Depending on the nuances of the individual case, the talented brief-writer might use discrete parts of the entire spectrum. For example, if I were drafting a brief for the Texas Supreme Court or the United States Supreme Court and arguing questions of policy, I might very well use view #2 to survey the law in a number of jurisdictions and to give the high court a clear view of how the majority of courts have handled comparable cases. On the other hand, if as appellee I were defending a jury verdict with well-established precedent, I would probably tend toward view #1. As is so often true in this profession, one size does not fit all.

HON. CAROLYN D. KING
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

View #1 is by far the better one. Every court that I know of is in overload. In that situation, a judge has to be able to pick up the key arguments quickly, as well as the key rebuttal arguments. The densely packed brief — as you put it, "a repository of all the information that a curious judge might want to know about the case" — forces the judge to spend more time and to work harder to form an opinion. In today's judicial environment, that's a luxury most judges can't afford. I might say that in a very complex case, a densely packed brief may be absolutely necessary to the formation of the judge's view and to the preparation of an accurate opinion. But that is the exception.

HON. ANDREW J. KLEINFELD
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

View #1 is the better view. Much of a lawyer's task is boiling things down. The overwhelming problem of the judiciary is volume, so a lawyer's ability to command the full attention of a judge is much affected by clarity and brevity. If we need more, we can get it by requesting supplemental briefs, and by doing or directing our law clerks to do additional research. When a brief is stuffed with everything that might be said, it is easy for the judge to overlook the important points in the morass of less important points.

HON. DANIEL M. KOLKEY
CALIFORNIA COURT OF APPEAL (SACRAMENTO)

In persuasion, as in poetry, less is often more. So view #1 will result in the better brief. An effective brief is pithy, focused, and, equally important, well organized. Stray points only dilute the force of an argument, or distract from it. And remember that a scattershot approach diminishes the brief's focus, diverts the court's energies from the arguments that count, and exhausts the court's attention. Sections and subsections should be liberally used to focus a busy court on the key components of the argument, and only one point per subsection should be made. Research should be exhaustive from the writer's standpoint, but not exhausting from the reader's. All in all, an effective brief should begin with a pithy paragraph that focuses on the issues and convinces the court of the validity of the result the lawyer seeks, proceeds with a fair and relevant recitation of the facts, and makes only persuasive legal arguments, each in a concise, logical, and well-organized manner.

HON. HAROLD A. KUSKIN
TAX COURT OF NEW JERSEY

If I had to pick one of the two views, I would select the first. In my view, however, a good brief should include elements of both descriptions.

A brief should deal with all issues, but the author should determine the relative importance of the issues and adjust the length of the argument of each issue accordingly. Selection by the brief-writer of the issues "that bear on the decision-making process," and exclusion of all others, is dangerous. The perspective of a neutral decision-maker, the judge, on what issues are determinative may differ from the perspective of an advocate. This difference could result from the judge's greater or lesser familiarity with the applicable law or from the judge's unbiased, nonadversarial view of the facts and the law.

Once the brief-writer establishes the relative importance of the issues, the legal argument on each issue should be thoroughly supported, but a law-review article is not necessary or appropriate. Multiple footnotes, string citations, citations from foreign jurisdictions that are marginally relevant, and "learned" discussions of legal principles not in dispute are all boring, distracting, and ineffective.

The most effective brief contains a comprehensive and comprehensible statement of facts that is not unduly slanted, followed by clearly articulated legal arguments on the issues. Each argument should cite carefully selected, accurately analyzed authorities. Any minor or peripheral issue should be argued in a manner reflecting both the writer's belief in the merits of the position asserted (a judge will quickly disregard an argument that is obviously a "throwaway") and the relative significance of the issue.

HON. JOSEPH E. LAMBERT
CHIEF JUSTICE, SUPREME COURT OF KENTUCKY

View #1.

HON. HARRIET LANSING
SUPREME COURT OF MINNESOTA

With one minor hesitation I strongly endorse the view expressed in #1 over the view expressed in #2. A brief should be a responsible piece of persuasive writing. Ideally it offers the reader a coherent and carefully developed theory of the case, based on an accurate rendition of the facts and a comprehensive analysis of the relevant law.

The brief described in #2 is a brief I do not want to read. Excessive citation of marginally relevant law usually wastes the reader's time and detracts from the coherence of the analysis. Length for the sake of length is simply a wrongheaded strategy. It asks too much of the reader to slog through unnecessary material at the sacrifice of usable focused time. If I am curious about some aspect of the case that is not in the mainstream analysis, my clerks can track down that information. It is better that I choose how to waste my time than that I begin to believe someone is wasting it for me.

But what my clerks and I cannot as readily do in a short amount of time is to generate from a formless record the knowledgeable, time-earned perspective that can transform the scattered bits and pieces of law, fact, and procedure into a solidly crystallized formation that becomes the genesis for the resolution of the case. It is the well-written brief that reliably identifies the crystals in the fluid and authentically forms and distills its structure around the true legal and factual cruxes, equities, and consequences. This is what causes us to rejoice — not often, but volubly.

My one hesitation in selecting view #1 is the clause "but omits everything that does not advance the argument." Read in conjunction with the earlier phrase, "while rebutting the opposition's

counterarguments," it is mostly a good description. But keep in mind that the advocate must disclose adverse controlling authority even when not argued by the opposing attorney. And also keep in mind that a responsible judge must almost always do independent research that may turn up relevant authority not argued by the opposing party. The solid brief must also provide reasons why strong opposing authority should not be applied.

HON. BOYCE F. MARTIN, JR.
CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

My view has always been #1, that a brief, clear essay is the most important and persuasive part of a brief. For example, I begin every appeal the same way. I read what the district court did first. I might say that this has been my experience both on the Kentucky State Court of Appeals and on the federal Court of Appeals. I think that this initial document gives me more information than anything else. I then turn to the appellant's brief and hope, as outlined in #1, to understand the appellant's position. Regrettably now, more than half the briefs that are filed are incomprehensible; they contain either excessive string cites or not enough factual information to understand why they are objecting to the lower court's decision.

I think that #2 is burdensome, at least on appellate judges around the country now, because with a limit of 50 pages, many are using every page and every word available. Clearly, we are unable to read everything that is filed in these kinds of cases. I have noticed over the years that the short, clear essay briefs are the ones that I put in my briefcase as I go home each night, and many times will skim two or three of them and get a far better idea of the case than the monumental dissertations that I receive in the cases where the attorneys have followed #2. I remember the expression "You have only a moment to make a good first impression," and certainly I think that this applies to brief-writing as well as to oral argument. Most of our judges come to the court well prepared, and most of us discuss at

times the purpose and benefit of the briefs. It's more and more prevalent that the briefs are way too long, raise way too many issues, cite way too many cases outside our circuit, and offer little concrete help in the resolution of the case before us.

HON. GILBERT S. MERRITT
U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

Obviously #1 is better than #2. Unfortunately, judges no longer have much time to linger over a case, as in the old days. The emphasis now is: "Get to the point." I wish for the old days when we could linger and reflect.

HON. JAMES C. NELSON
SUPREME COURT OF MONTANA

The better view is expressed in #1.

The Montana Supreme Court is the only appellate court in this state. In the year 2000, 868 new cases were filed; we handed down 389 full written opinions (exclusive of hundreds of orders); each justice must read, on average, from 1,000 to 1,200 pages of written material each week, 52 weeks a year, to keep up with the workload. I wrote 58 full opinions last year, 9 dissents, 7 concurrences, and 6 combination concurrence-dissents. That is about average for our court. Each justice has two clerks. Even if I had the inclination (and I don't), I have no time to pore over lengthy, poorly written, inadequately researched, poorly reasoned, shotgun briefs, motions, or memoranda.

The best brief is the one that is limited to no more than three good solid issues. It is concise; it is absolutely accurate in its citations to the record and to authority; it is written in an understandable fashion, chronologically; and it contains appropriate headings, guideposts, and summaries. Most important, it assumes that every-

thing I need to know about the case is in the brief — because, realistically, I will never have a chance to review the entire record before voting. Accordingly, the brief is written so that within the first two or three pages, I know basically what the case is about; what legal questions are at issue; what will be our standard of review; what are the essential arguments; and what is the relief sought. The balance of the brief should simply be an expansion on those points. Finally, the brief must scrupulously follow our rules of appellate procedure.

HON. JOHN T. NOONAN, JR.
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

If forced to choose, I'd opt for view #1. But I would modify it by adding a short postscript briefly stating other issues that might catch some judge's eye.

HON. THOMAS R. PHILLIPS
CHIEF JUSTICE, SUPREME COURT OF TEXAS

I strongly encourage view #1. Most judges have growing caseloads and are increasingly impatient with anything that does not help them use their time efficiently. Ancillary or dubious arguments, or marginally relevant authorities, are likely to do nothing except obscure your best points. I would recommend preserving error on *all* points, and offering to file supplemental briefing on the issues you consider secondary.

HON. HARRY PREGERSON
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

View #1.

HON. THOMAS M. REAVLEY
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

It depends on the case, of course, but #1 states a far better view than #2. The latter represents what I would expect to be the view of a law professor or a lawyer whose priority is the size of the fee. It represents the view that has led appellate advocacy to its state of mediocrity or worse.

If the judges want more help, we can ask for it. So view #2 is poor advocacy for most of us who spend our lives reading these briefs. I say "most of us" because I know friends and colleagues who cannot get enough of "the law" and who are intent on burdening society with opinions to match #2.

HON. JOHN H. RUFFIN, JR.
GEORGIA COURT OF APPEALS (ATLANTA)

View #1 is that briefs should be relatively short and concise, with limited presentations of the arguments supporting the author's position. View #2 favors broader expositions of the law, covering as much terrain as possible in the space allotted. While both views may have merit, depending on the nature of the argument, I prefer the first view. But I would encourage attorneys to carefully tailor briefs to fit the requirements of their argument. The overriding goal should be to gain the reader's (judge's) respect with writing that exemplifies expertise of the relevant law, professionalism, brevity, and clarity.

Authors will be respected by the reader if they honestly discuss the law and the facts. If controlling precedent *clearly* disposes of the

issue in the author's favor, the author should not dilute the strength of this authority by discussing less compelling authority or arguments. If there is any adverse controlling authority, however, the author must address it, and should discuss other persuasive authority that will help resolve the conflict. Likewise, an honest discussion of the facts precludes the author from citing irrelevant, prejudicial evidence and quoting testimony out of context.

Finally, authors should never employ such unprofessional tactics as denigrating opposing counsel, parties, or the trial court.

HON. MOREY L. SEAR
U.S. DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA

View #1 is the better of the two. I prefer a brief that is clear and advances the most important of counsel's arguments. The court will get down to the issues that it wants to hear in its questioning of counsel at the time of oral argument.

In my opinion it is far better to let the court know as simply as possible what your case is about and what you believe the issues to be. All this needs to be stated as simply as possible.

HON. J.D. SMITH
GEORGIA COURT OF APPEALS (ATLANTA)

I have a strong preference for view #1. In fact, it's a good, cogent statement of almost everything I think a well-written brief should be. View #2 is, to me at least, a rationalization for intellectual laziness or for an unwillingness to recognize that an appeal simply has no merit. This kind of brief usually, though not always, tells me that the lawyer who wrote it is trying to mask weakness: either an absence of any genuine reversible error or a lack of any idea of how to advance a truly persuasive argument. Lawyers who really have little or nothing to say almost always use the full number of pages allowed,

and they cram their briefs with meaningless detail and weak, even ludicrous arguments. A reliable tip-off to this kind of brief is a statement of facts that not only describes every pleading filed and every hearing conducted in the trial court but also chronicles the exact date of each. Unless it directly bears on an issue, that kind of detail seldom helps the appellate judge reading the brief, but it's a great way to fill up those pages.

HON. JOSEPH T. SNEED
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

You will not be surprised that I prefer view #1. But its second sentence goes too far toward brevity unless the command "to omit everything that does not somehow bear on the decision-making process" is read somewhat generously.

From the standpoint of the reading judge, the writer's object is to impart a sense of awareness of the controlling issues. Such a brief permits the judge to move on to the next brief assured that he has a reasonable grasp of the issues deemed important by the brief-writer.

HON. ALICEMARIE H. STOTLER
U.S. DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

View #2 is the description of the brief that I would like to be the judge to have the time to read. (Go ahead, parse that.)

Judicial work does not permit that sort of catchall approach, however, no matter how interesting the subject matter. Instead, we need to come to a decision promptly, and we depend on the parties to supply the essentials of what we need to know, factually and legally. The brief to do these jobs must also answer the opponent's arguments. For these reasons #1 describes what a brief should be.

HON. TED R. TODD
CIRCUIT COURT, MADISON, INDIANA

I certainly find #1 far ahead of #2. Always have felt that way.

HON. E. NORMAN VEASEY
CHIEF JUSTICE, SUPREME COURT OF DELAWARE

The best briefs tend to have the characteristics described in view #1. As Chief Justice Rehnquist has said, the brief-writer must be immersed "in the chaos of detail and bring order to it by organizing — and I cannot stress that term enough — by organizing, organizing, and organizing . . . ."

The best briefs tend to present a small set of arguments and do so in few pages. They typically do not contain a handful of weak arguments in addition to the main issues on appeal. These arguments, though perhaps appropriate at times, might be distractions for both judge and brief-writer, and risk demonstrating that the brief-writer lacks discernment.

It is not useful to cite cases that are only weakly supportive. If there is only weak authority for an argument, long string cites will not successfully disguise that fact.

In most instances, the purpose of a citation should be explained. A case may be important for its facts, its holding, its reasoning, its approval of other authority, or an observation that is dictum. It is essential to tell the court exactly how a case is being used.

A judge, when writing an opinion, strives to craft precise and well-formulated legal holdings that derive from careful analysis of the facts, the procedural posture of the case, interpretation of relevant documents, and application of relevant authority. A brief must adhere to those same standards of precision and care.

HON. WILLIAM C. WHITBECK
MICHIGAN COURT OF APPEALS (LANSING)

With a small caveat, I agree strongly with view #1 for appellate briefs. The caveat relates to the statement of facts. While the statement need not be long (and should never include the deadly witness-by-witness summaries of testimony that some brief-writers favor), it should be comprehensive enough that a judge can, without a great deal of effort, use it in whole or in part in the opinion. In short, do the judge's work in the statement of facts. It goes without saying, therefore, that the statement should be scrupulously accurate and objective; nothing turns a judge against a brief-writer more quickly than a false or unfairly slanted assertion in the statement of facts.

With that caveat, it has been my experience that the more succinct the brief, the better. First, most appellate judges read the equivalent of *War and Peace* each week. Why add to the eyestrain unnecessarily? Second, when I see a truly weak or throwaway argument, I tend to read the stronger arguments in the brief with a much more skeptical eye. Third, citing "as much law as possible" is a truly dumb idea. It is, of course, the *relevant* law that is important, and string citations to every published case touching on the subject not only are aesthetically displeasing, but also make the judge's job harder. This is not a good idea if the brief-writer actually wants to win. Thus, although I often write long opinions, I always favor the short, strong brief.

HON. MARK WHITTINGTON
TEXAS COURT OF APPEALS (DALLAS)

I believe #1 is the more effective approach to briefing. Of course, it is imperative that the writer correctly identify the two or three key issues that the justices will resolve to determine the outcome of the appeal. I think identification of the key issues is the most important

decision that is made in preparing the appeal. I would always solicit advice of other experienced appellate practitioners in making this decision.

HON. STEPHEN F. WILLIAMS
U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Obviously the selfish judge has got to say that #1 is to be preferred. But the honest judge has got to recognize that assessing a case for the most promising arguments is not as easy as one would like. So the answer is, I think, that the brief-writer should aim at #1, without imposing artificial limits on himself, but should prune away every argument that, once he has stated it to the best of his ability, cannot be said to have a reasonable chance of success. In any event, no part of a brief should survive unless it meets the quality standard of #1. View #2's obvious inclination to metastasis should be resisted at all costs.

HON. WILLIAM R. WILSON, JR.
U.S. DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS

It is view #1 by a mile. Some lawyers follow the spirit of #2 in oral argument. I'm often sorely tempted to say, "Please knock on the lectern when you come to something important."

On rare occasions, when a trial judge asks for special briefs, the #2 approach might be appropriate. In these instances the judge's attention is focused. In most cases, however, a pithy, hard-hitting brief is better.

All judges, as well as lawyers, get a lot of paper nowadays. A to-the-point brief is much more likely to get my attention and to persuade me.

While some judges would probably object, I would be happy, in most instances, with an outline and citations of authority under each point — without any prose whatsoever.

HON. DIANE P. WOOD
U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

My first reaction to the two views you sent was that this was some kind of joke. It reminded me of the facetious options memo we wrote when I was in the State Department. Option 1: surrender. Option 2: deploy nuclear weapons. Option 3: hold a meeting with the Prime Minister. I'm sure you know what kind of volume flows through any appellate judge's chambers. A brief that follows the throw-it-on-the-wall-and-see-what-sticks approach of option #2 causes my heart to sink. No issue will be developed well; no weakness will be confronted honestly and effectively; no winnowing of the wheat from the chaff in light of the final record will help clarify the case.

Having said that, I know why some lawyers use option #2. They are afraid of the dreaded "W" word (and I am not making a political point here). My court and (I'm sure) most others are quick to find waiver of arguments that have been abandoned. It takes a good lawyer with confidence in her judgment and in her case to write the kind of brief you describe in option #1. But those briefs are heaven to receive, and they serve the client far better than the second type.

The only time one might want to be a little more generous than your description of option #1 is if it is a criminal case. My own practice is to try to devote the discussion in my opinions to the more important issues, and to be far more cursory with the obvious add-ons. The only exception is capital cases, where I believe so much is at stake that both lawyers and courts should err on the side of inclusiveness. Even there, however, a well-developed, strong argument is far better than three paragraphs apiece on every blip that occurred during the entire history of the case.

Neither View Is Quite Right

HON. FRANK M. COFFIN
U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT

I think that, in setting forth the two views, you may have stacked the deck. I say this because view #2 contemplates an unrealistically open-ended document: *all* information that a *curious* judge *might* want . . . *as much terrain as possible* . . . use *all space* with arguments (*though possibly weak*) that *might appeal* to some . . . plus *as much law as possible.*

My own feeling is that one should envisage his brief reaching two audiences via two components. The first is addressed to all the judges on the bench or panel, and their law clerks. This is pretty much what view #1 describes. The second audience is the writing judge and her law clerks. That component consists of expanded references to cases, law-review comments, more detailed factual discussion, chronologies, notations of divisions among states or circuits, etc., that can be put into footnotes, and occasionally into appendices. Such a component would be more along the lines of view #2, but substantially more restrained.

HON. EDITH HOLLAN JONES
U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

Responding to Bryan Garner's two models of brief-writing is similar to deciding a difficult appeal. Good arguments can be made for either model, and the truth lies somewhere in between.

Lamentably, modern briefing rules and the complexity of litigation (even a Title VII discrimination case can legitimately raise eight or nine issues) militate against the 5- to 15-page brief. But to me, forceful brevity is the ideal, even when you must raise several issues. Nothing persuades like a succinct factual recitation that carefully cites the record and a legal argument spiced by the most current,

most on-point citations available. Appellate judges read the briefs; we are familiar with basic legal principles and are unimpressed by string cites and hornbook generalities. This does not mean that you should omit explaining the context in which an issue arises. To take two quick examples, cases involving administrative law or contracts may well benefit from a recitation of the regulation's purpose or the parties' dealings.

Raising weak arguments is usually viewed by us as a sign of an appellant's weak position. Like redundancy and long footnotes, weak arguments will not help your appeal.

In sum, confidence and authority should permeate your brief. Wordiness is antithetical to this image.

HON. ROBERT E. KEETON
U.S. DISTRICT COURT, DISTRICT OF MASSACHUSETTS

My answer is neither. Each is a view that states, but overstates, a valid point.

Better than either of those views is a more judicious view emphasizing that as a brief-writer you are trying to persuade a judge (or panel of judges) committed to impartiality in both process and decision. Also, critical to an impartial view is that a decision on the merits is far preferable to a decision that one side or the other is defeated because of some procedural default that makes it unnecessary, and perhaps even forbidden, for the court to excuse the procedural default and make the decision on the merits.

If the distinctive characteristics of the particular case make it one in which the fairest and most appropriate outcome on the law and facts is driven by only one or two issues in genuine dispute, focus on the one or two decisive issues.

If, on the other hand, the particular case lacks a sharp focus because of its peculiar characteristics, then cover as much of the terrain as you can, giving most of your attention to the issues you

think are most likely to be viewed by the court as decisive of the outcome in some significant respect.

HON. JON O. NEWMAN
U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

I think the choice between #1 and #2 presents a false dichotomy. Neither version has it exactly right, although there are elements in each with which I agree. As to #1, surely a brief should be "clear" and the arguments should be "well-supported." Whether the brief should be limited to two or three arguments and to 5, 10, or 15 pages depends on the nature of the appeal. Sometimes only two or three arguments are worth making; sometimes many more need to be presented. As for omitting "everything that . . . does not somehow bear on the decision-making process," I don't know how the advocate is supposed to make that determination. Even judges do not always know what influences their decision-making.

As to #2, including all information about a case is probably excessive. So is citing as much law as possible. It is true, however, that predicting what a judge might think to be important is not always easy.

Brief-writing, like most aspects of effective lawyering, involves making choices. The lawyer needs to decide what points are worth presenting and what are not, and which supporting arguments and citations are worth presenting and which are not. There is no formula.

I think a good brief has one thing in common with Justice Stewart's description of obscenity: "I know it when I see it."

HON. JAMES A. PARKER
U.S. DISTRICT COURT, DISTRICT OF NEW MEXICO

I believe my preference falls into the "neither is quite right" category. In my experience, a brief that advances only two or three arguments can be a trap for a trial judge.

During my second year on the bench, I was reversed on the basis of a contention, made in a single sentence in a footnote, that I ignored. I had addressed the arguments presented in the text of the brief, but I simply paid no attention to what seemed to be an offhand remark in the footnote. Since then, in cases in which arguments have not been clearly set forth or adequately developed, I have asked for supplemental briefing or a clarification of a party's contentions.

An area of particular concern to me, and likely to other trial judges, is inadequate briefing of all relevant evidence in regard to Rule 56 motions for summary judgment. Too often attorneys opposing Rule 56 motions do not devote the time required to write strong, detailed briefs. They seem to have the attitude that a judge will not throw them out of court if they have a sympathetic client or an appealing claim. Or they may be overworked and do not give the briefing at the trial-court level the attention it deserves. Only after they appeal a summary judgment do they find time to scour the record and include in their appellate briefs references to evidence creating a genuine issue of any material fact that they had overlooked bringing to the trial judge's attention.

Some courts have local "estoppel" rules that limit review of a summary-judgment ruling to the parts of the record that the parties, in their briefing, mention to the trial judge. In these circumstances, summary judgments are affirmed even though noncited parts of the record actually support an issue for trial. In other instances, appellate courts choose not to apply the "estoppel" rules or strain to circumvent them and reverse summary judgments on evidence of which the trial judge was never made aware. Neither is a good result. View #1 of your survey seems to focus on briefing of legal issues and does not

appear to contemplate briefing of Rule 56 factual issues. That is one reason view #1 is somewhat deficient.

These are but two examples of why I as a trial judge prefer briefs that, quoting from view #2, provide "all the information that a curious judge might want to know about the case." I should note that I do not agree with most of the other statements in view #2, but the language quoted should, in some manner, be blended into view #1.

In summary, I would prefer to be as fully informed as possible about all issues, legal and factual, by briefs related to motions in the trial court.

HON. RICHARD A. POSNER
U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I don't think either description is quite right. If I had to choose, I would choose #1, but I would prefer not to choose. I do think the brief should contain "information that a curious judge might want to know about the case," even if the brief-writer is not quite sure of the importance of the information. But certainly the brief-writer should exclude arguments that he is confident are very weak, and it's definitely not "a good idea to cite as much law as possible." The judge or his law clerks can find the law bearing on the case; but information, including policy considerations, known only to the brief-writer and his client can enrich a brief immeasurably.

HON. WILLIAM R. PRICE
SUPREME COURT OF MISSOURI

A brief serves two functions. The first function is to persuade the judge; the second is to assist the judge in writing a solid opinion. In most cases, view #1 is the better choice. It is more persuasive and adequate help in opinion-writing. In very complicated cases, however, view #2 is better. Although less persuasive initially, it is of

much greater help to the judge in writing the opinion and therefore more persuasive when it counts.

HON. JOSEPH T. WALSH
SUPREME COURT OF DELAWARE

I am not certain that I can endorse either view as the "better" approach. Brevity and concise expression are certainly desirable goals in the presentation of a brief, but some cases require an in-depth examination of the facts or an elaboration of the applicable law. I do not believe that one can adopt a one-size-fits-all approach to briefing. That being said, I think that most judges will agree that, whatever the length of the brief, conciseness and clarity of expression are highly desirable goals. I wish that cases could be dealt with in 10 or 15 pages, but I think that is unrealistic considering the scope of some of the matters presented to an appellate court. While I reject the proposition that it is a good idea to cite as much law as possible, in important cases or those of first impression the court welcomes assistance in research and explanation of possible legal theories that might apply. In short, conciseness is a valuable attribute, but not if it falls short of giving the court a complete legal or factual presentation.